313 U.S. 560

IN THE

Supreme Court of the United States

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October Term, 1940

No. 785

WENZEL & HENOCH CONSTRUCTION COMPANY,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioner, Wenzel & Henoch Construction Company, a corporation, respectfully shows to the Court as follows:

Summary and Short Statement.

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit affirming a judgment against the petitioner entered by Yankwich, D. J., in the United States District Court for the Southern District of California, Central Division. The opinion for the Circuit Court of

Appeals was written by Denman, C. J., and was filed October 15, 1940.

The litigation arises in connection with certain agreements executed March 17, 1933, under which the petitioner was to construct the San Jacinto Tunnel as part of the Colorado River Aqueduct project. On January 8, 1937, the petitioner brought this action against The Metropolitan Water District to recover on three counts: (1) for $5,213,929.95 damages for breach of contract; (2) in *quantum meruit* for $1,346,720.75 for the reasonable value of work done; (3) for $150,000 money had and received. Answers were filed, and pursuant to stipulation, hearings on the issue of damages were postponed until after the determination of liability. Trial by jury was waived, and Judge Yankwich entered judgment against the petitioner on all counts [R. 427-29]. The Circuit Court of Appeals affirmed this judgment.

Statement of Facts.

The petitioner, Wenzel & Henoch Construction Company (hereinafter referred to as the "Company"), is a Wisconsin corporation engaged in the construction business. The respondent, The Metropolitan Water District of Southern California (hereinafter referred to as the "District"), is a municipal corporation of California. As part of the Colorado River Aqueduct project the District desired to have a thirteen mile tunnel constructed through San Jacinto mountain in Southern California. Before issuing specifications and a call for bids, the District caused a thorough geological survey of the projected tunnel route to be made. Exploratory drifts and extensive core drillings were made. With the information gained from this investigation, the District caused a

printed report to be issued as to the probable conditions of the work. This report, together with all the data upon which it was based, was made available to bidders, as were also the specifications, instructions, copies of the contracts, etc. [R. 74-265]. Paragraph B-6 of the instructions to bidders [R. 91] purported to relieve the District of any liability for the inaccuracy of this information; bidders were instructed to personally examine the location of the proposed work and to satisfy themselves as to the actual conditions and requirements and as to the accuracy of the estimated quantities of materials stated in the Bidding Sheet.

Section 7 of the specifications which were later made a part of the contract provided, *inter alia*, that if at any time the Chief Engineer of the District was of the opinion that the performance of the contract was unnecessarily or unreasonably delayed, he might, on behalf of the District, by written notice instruct the Company to discontinue so that the District could take over the work and complete it by a new contract or by force account [R. 120-121].

The Company was the low bidder and on March 17, 1933, the Public Works Contract was executed [R. 111-14]. On the same date a supplemental agreement was executed by the Company and the District for the purpose of establishing the responsibility of the Company [R. 261-65]. Under the latter agreement the Company agreed to establish and maintain in a California bank in cash or approved bonds a fund of $250,000 plus certain progress payments. Under this supplemental agreement the Company further agreed to deposit with the laborers' and materialmen's surety corporations $300,000 as collateral for the purpose of indemnifying the District.

Immediately thereafter the Company began moving in equipment and sinking shafts preliminary to the work on the tunnel proper. The tunnel excavation was started in the early part of 1934 and from the very beginning conditions were encountered radically different from those anticipated in the Bidding Sheet, specifications, and in the extensive geological report furnished by the District. These sources had for the most part furnished the foundation upon which the bids had been based. The character of the ground and the amount of water encountered was completely different from that which had or could reasonably have been anticipated. The Company's complaint is not merely that the construction was more difficult or more expensive than was expected. The Company contends that the condition of the ground and the flowage of water actually turned out to be so completely different from such conditions as they were understood to exist or could reasonably have been anticipated to exist by each of the contracting parties, that performance of the public works contract as it was originally understood by the parties was impracticable because of the extreme difficulty and excessive expense involved. For example, the District estimated, as included in its bidding sheet, that the ground condition was such that about 500,000 pounds of steel support would be required for the entire line of the tunnel, and the cost of such an amount of steel was estimated by the Company in preparing its bid [R. 100]. Actually, in completing the first 18% of the total excavation the Company had to install 2,500,000 pounds of such steel support [R. 461]. On "Sheet 7" attached to the public works contract there was a log of certain core drillings prepared by the District's geologist [R. 260]. On this sheet the bidders were referred for further infor-

mation to the data contained in the geologist's extensive printed report No. 474 [Pltf. Ex. 16; R. 765], a portion of which was set out in the Company's original complaint [R. 18-21]. "Sheet No. 8" attached to the public works contract was a drift log showing the character of the ground encountered and estimating the maximum flow of water at 310 gallons per minute [R. 261]. The information set forth on " Sheets 7 and 8" and in the geologist's printed report indicated that no great water flow would be encountered and that most of the tunnel would be in solid ground. In the examination of the site of the tunnel which the Company was able to make during the forty days between the invitation for bids and their due date nothing was found to indicate that the District's information did not portray a correct picture of the underlying ground conditions. Certainly the District believed such reported facts to be true and so did the Company, and there is no evidence that either party was negligent in so believing; the contracts were entered into with both parties believing these underlying conditions to exist. In making its bid the Company set out that it proposed to use pump de-watering equipment capable of handling 1000 gallons a minute, enough to cope with far in excess of the 310 gallon predicted maximum. In accepting the Company's bid without question and approving such equipment the District would seem to have indicated that it regarded such equipment as adequate. But very soon after excavation was started on the tunnel proper slushy ground and unprecedented flows of water developed. The flowage thus encountered was so great that at one time during July, 1934, water rushed into the tunnel at the rate of 10,000 gallons per minute, a flowage thirty-three times greater than the maximum expected by either the Com-

pany or the District [R. 451]. The pumping equipment was flooded out, the tunnel was filled with mud, water, and rock. The Company immediately attempted to secure sufficient pumping equipment to cope with this unprecedented flow but large enough pumps had to be made to order [R. 452]. New head frames had to be built within the excavation to handle the tremendous pumping equipment, and after waiting for head frames to be built and for the pumps to be manufactured, it took three months to empty the water and debris out of the tunnel [R. 453]. After the excavation was cleared and work was resumed the water flowage continued at the rate of 1000 gallons per minute, thrice the predicted maximum. Hardly was the situation under control when, in November, 1934, a second underground surge was encountered flooding out the new enlarged pumping machinery and again filling the tunnel with mud and water [R. 454]. After the damage from this second flood was finally repaired the average flow of water continued at 3000 gallons per minute [R. 455]. The great quantities of gravel and rock which came in with the water hindered the normal operation of the pumping equipment [R. 456]. What machinery had not been ruined by these two floods had to be completely reconditioned. There is no evidence that the Company should reasonably have anticipated these conditions or that they could have prevented them. The Company, realizing that the construction could not practicably be continued under such conditions sent a letter to the District in December, 1934, asking permission to deviate from the charted course and put the tunnel through what was expected to be better ground [R. 458]. The District stalled this request until it had forcibly taken possession of the work away from the Company as hereinafter re-

counted. It is interesting to note that when the District took over the work it soon realized that further performance according to the original plans was impracticable under existing conditions. The District itself soon deviated the excavation work from the course the Company had been forced to follow [R. 1079, 1082, 1086].

Under the ordinary conditions encountered at the very beginning, the tunnel excavation had been running ahead of schedule, but naturally, when the Company ran into the unforseen conditions above described there was delay. No one doubts that the nature of the conditions underlying the work was essentially different from that which both of the contracting parties had in mind when the agreements were executed. Nevertheless, on December 3, 1934, shortly after the second unprecedented flood described *supra,* the District's engineer notified the Company that the work was unnecessarily and unreasonably delayed and unless progress improved by January 15, 1935, the District would take over the work. On January 9, 1935, the District notified the Company that they understood that the construction fund established by the supplemental agreement had been excessively depleted and that the District was withholding the current progress payment pending receipt of a full explanation [R. 562-63]. On January 14, 1935, the Company furnished the desired explanations and protested the withholding of the progress payments [R. 566-70]. On January 15, 1935, the District instructed the Company to discontinue so that the District could take over all work as the District Engineer was of the opinion that the work had been unnecessarily and unreasonably delayed [R. 571-72]. The Company, feeling that the work had not been unnecessarily and unreasonably delayed, at first refused to give up and the District

in a suit which it instituted was denied a preliminary injunction which it sought to prevent the Company's continuation [R. 271-72]. On February 12, 1935, under cover of darkness with physical force and armed men, the District took over the job and all of the Company's equipment, and retained such possession and continued the work to its completion [R. 420].

On January 8, 1937, the Company instituted this action in the United States District Court for the Southern District of California. The requisite amount in controversy being present, federal jurisdiction is based on diversity of citizenship. The Company sought recovery on four separate causes of action: (1) for $5,713,929.95 damages for breach of contract; (2) in *quantum meruit* for $1,346,720.75, the unpaid reasonable value of work done; (3) for $150,000 money had and received; and (4) in *quantum meruit* for $161,306.53 for reasonable value of extra work done. Judge Yankwich overruled demurrers to the first three causes of action. He sustained a demurrer to the fourth cause of action and with leave to amend granted the defendant's motions to strike certain portions of the complaint, including the paragraph referring to and partially setting out the printed report of the District's geologist and alleging that the Company relied thereon in making its bid [R. 51-52]. A jury having been waived, the action was thereupon tried before Judge Yankwich. During the trial Judge Yankwich refused to admit in evidence the previously referred to report of the District's geologist [Pltf. Ex. 16; R. 765]. He also excluded all testimony tending to prove that both parties relied upon this report and other information supplied by the District in making the contract [R. 1284-90], and he refused to allow certain amendments to the Company's

complaint incorporating such matters [R. 1296-1300]. By stipulation, evidence on the issue of damages was postponed until liability had been finally determined [R. 425-26]. The trial court entered judgment against the Company on all counts. The Circuit Court of Appeals affirmed, holding (1) that the District Engineer's order to discontinue work was justifiable and that the District by withholding the December progress payment was not guilty of a breach sufficiently great to frustrate any further rights of the District under the contract; (2) that there could be no recovery in *quantum meruit* because it appears from the record that there was no rescission of the contract within a reasonable time of the breach; and (3) that there was no prejudicial error with regard to the trial court's rulings with regard to the pleadings and the evidence.

Questions Involved.

(1) If the conditions actually underlying the construction were so greatly different from the underlying conditions as they were understood to exist by both parties when they entered into the agreement as to render performance according to the terms of the original agreement impracticable due to excessive and unreasonable difficulty and expense, was the trial court justified in holding that as a matter of law the Company could not recover in *quantum meruit* for the reasonable value of the labor and materials furnished.

(2) If there was a possibility that the underlying conditions actually encountered might reasonably have been regarded as so greatly different, was it not prejudicial error for the trial court to strike that portion of the Company's complaint, to refuse to allow the Company's

proposed amendment, and to exclude all evidence and testimony referring to the District's geological report and showing that the parties entered into the contracts relying upon information contained therein, and believing that the conditions underlying the agreement were as described therein?

(3) Even though the original contract is not to be deemed abrogated in its entirety, in view of the relation between the unanticipated ground conditions and the time initially estimated for completion of the work, was not the District's seizure of the work because of alleged delay combined with its previous refusal to pay the December progress payment a breach of contract?

Reasons for Granting Writ of Certiorari.

The petitioner prays that the Court grant a writ of certiorari in this case:

(1) Because the District Court and the Circuit Court of Appeals in disposing of this case have failed to apply, or reach a result consistent with, the local law of the State of California;

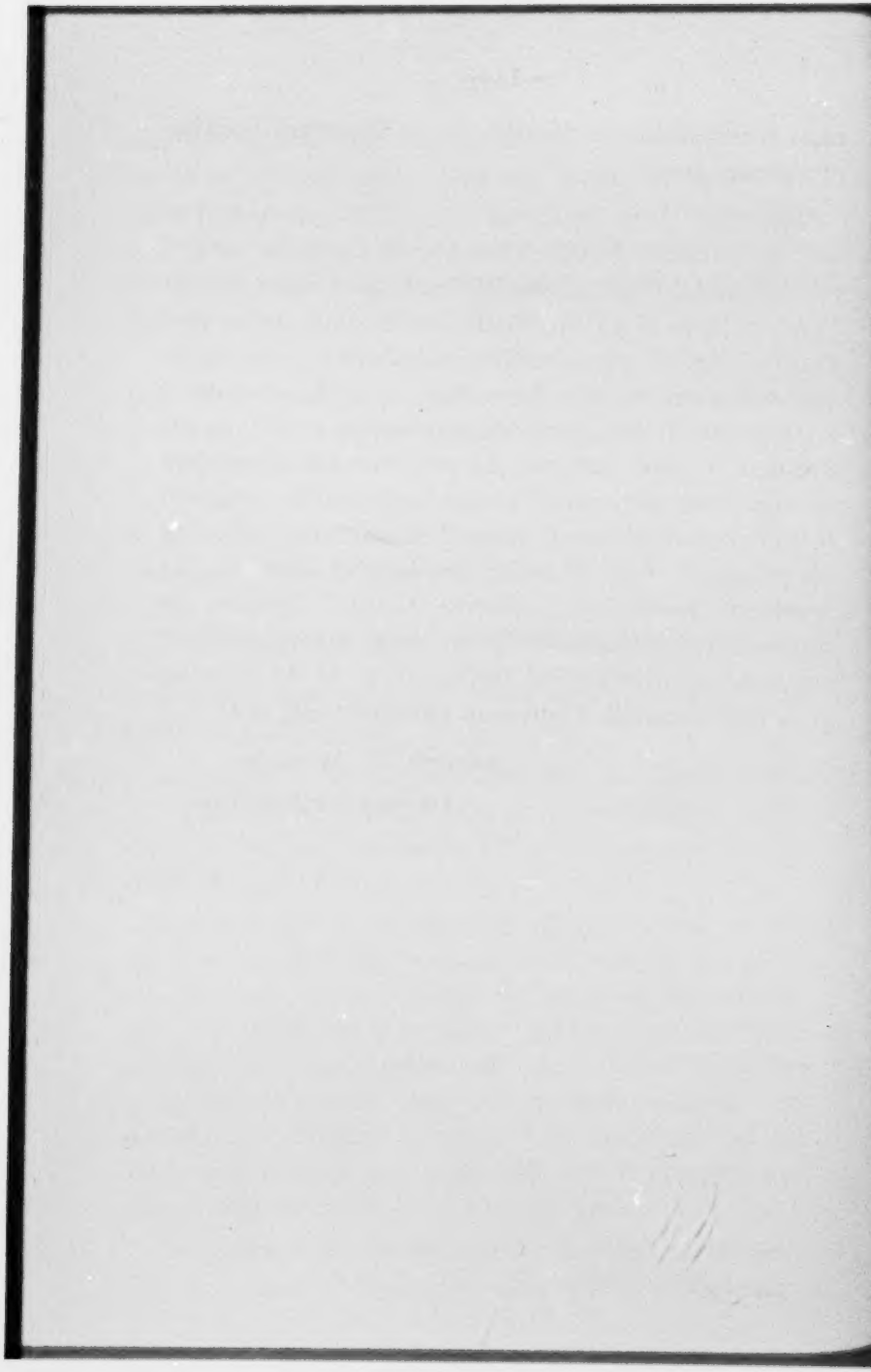
(2) Because the adjudication of this action by the lower courts, if allowed to stand, would amount to a gross miscarriage of justice, inequitably removing the unfortunate but fortuitous construction burden from the State of California which derives all of the benefit from the completed work and is better able to stand the added cost, and thrusting it upon the innocent contractor who derives no benefit, is in no way responsible for its presence, and who is less able to support its weight; and

(3) Because the pronouncement by this Court upon the legal issues involved in this case will do much to pro-

mote the equitable clarification of an important doctrine of contract law.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that the judgment of said Circuit Court of Appeals in this case, affirming the judgment of the United States District Court for the Southern District of California, Central Division, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ARTHUR E. MORETON,
Attorney for Petitioner.



IN THE

Supreme Court of the United States

October Term, 1940

No. .....

WENZEL & HENOCH CONSTRUCTION COMPANY,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit by Circuit Judge Denman is reported in 115 Fed. (2d) 25. The opinion of District Judge Yankwich [R. 391-403] is unreported.

Jurisdiction.

The opinion of the Circuit Court of Appeals and the order for a mandate were filed October 15, 1940. A petition for rehearing was duly filed; such petition was denied November 27, 1940. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts.

The statement of facts and questions presented appear in the annexed petition for certiorari.

Errors to be Urged.

(1) That the trial court was guilty of prejudicial error in holding that as a matter of law the Company could not recover in *quantum meruit* for the reasonable value of labor and materials furnished.

(2) That the trial court was guilty of prejudicial error when it granted the District's motion to strike that portion of the Company's complaint referring to the District's geological report and alleging that both parties entered into the contracts relying upon and believing the information contained therein to be descriptive of the actual conditions which would underlie performance.

(3) That the trial court was guilty of prejudicial error in excluding the geological report from evidence and in excluding other testimony tending to establish that when the contract was made both parties believed the actual conditions to be accurately described in said report.

(4) That the trial court committed prejudicial error in refusing to allow certain amendments to the Company's complaint.

(5) That the trial court committed prejudicial error in refusing to hold that the District's seizure of the work because of alleged delay combined with its previous refusal to pay a progress payment amounted to a breach of contract.

ARGUMENT.

I.

The District Court and Circuit Court of Appeals in Disposing of This Case Have Failed to Apply, or to Reach a Result Consistent With, the Local Law of California.

The Supreme Court of California was among the first to adopt the relatively modern and more equitable theory of contract law that impracticability due to excessive and unreasonable difficulty or expense is as valid an excuse against the strict enforcement of contract obligations as objective impossibility in the strict sense.

Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1 (1915);

Transbay Const. Co. v. City and County of San Francisco 35 F. Supp. 433 (N. D. Cal. 1940);

See,

Christin v. Superior Court, 9 Cal. (2d) 526, 533, 71 Pac. (2d) 205, 208 (1937);

6 *Williston, Contracts* (Rev. Ed. 1938), §1931;

Restatement, Contracts (1932), §454.

In *Mineral Park Land Co. v. Howard, supra,* the defendants who had contracted to build a bridge, entered into an agreement with the plaintiff, a nearby land owner, whereby the defendants were to take from the plaintiff's land at a stipulated price all the gravel and earth necessary in the construction of the proposed bridge. The defendants used 101,000 cubic yards of gravel of which they procured 50,869 cubic yards at a place other than the plaintiff's premises. The trial court found that the plain-

tiff's premises contained earth and gravel far in excess of 101,000 cubic yards, but that only the amount actually taken by the defendants was above the water level, and for the defendants to have taken any more, though not impossible, would have entailed great expense and delay and would not have been practicable from a financial standpoint. The California Supreme Court held that the defendant had a valid excuse for not taking more gravel, refusing to apply the doctrine that difficulty of performance does not excuse one from performing an act which is not in its nature impossible. The Court said:

> "Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then it was impossible for defendants to take it.
>
> * * * * * * * *
>
> " 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost.' I. Beach, Contr. Sec. 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

The California Supreme Court enunciated this doctrine with approval as recently as 1937 in *Christin v. Superior Court, supra,* where it said (71 Pac. (2d) at 208):

> "Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense. *Mineral Park Land Co. v. Howard,* 172 Cal. 289; 156 Pac. 458; L. R. A. 1916F, 1; *People v. Meyers,* 215 Cal. 115, 8 P. (2d) 837; Restatement, Contracts, §454."

Section 454 of the Restatement of Contracts, cited with approval by the California Supreme Court in the *Christin* case, *supra,* states:

> "454. DEFINITION OF IMPOSSIBILITY. In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

Transbay Const. Co. v. San Francisco, supra, was decided in the United States District Court for the Northern District of California by Judge St. Sure, on October 24, 1940. This case is similar in many respects to the case at bar and it is submitted that the District Judge in the *Transbay* case correctly applied the local law of California. In the *Transbay* case the plaintiff construction company, a Delaware Corporation, agreed with the defendant to furnish labor and materials for a dam enlargement. In return the defendant agreed to pay for the work upon performance. According to the plans and specifications, the amount of rock excavation was estimated at 30,000 cubic yards. It later developed that for a satisfactory dam foundation the contractor was

required to excavate 84,000 cubic yards. Plaintiff alleged that the reasonable value of the aggregate labor and materials was $4,291,628.28, that the defendant only paid $3,457,000.69 as required by the terms of the original contract, and that there was still owing a balance of $834,627.59 for reasonable value of labor and materials furnished. The contract, in many respects quite similar to the one involved in the case at bar, had provisions requiring the bidders to make a personal examination of the proposed work, stipulating that the quantities were estimates only and that the right to increase the amount of work was reserved to the defendant, and specifically providing that the contractor should make no claim for damages or extra payment. The defendants stood upon the strict letter of the contract, contending that the plaintiff took all risks and must assume all losses. It was argued that when work is rendered more difficult or expensive by the happening of an unforeseen contingency, performance is not excused and there is no basis for a claim for additional compensation. The court, refusing to accept this argument, found for the plaintiff, saying:

> "Under the facts and circumstances shown by the record, I feel that it would be unjust to permit defendant to strictly enforce the contract against plaintiff. Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof. I think that the contract may be deemed abrogated and plaintiff should be permitted to recover on a *quantum meruit* basis. (Citing cases.)"

It is respectfully submitted that the facts of the case at bar bring it within the above discussed rule of Cali-

fornia law. It is submitted that the District Judge disposed of the instant case in a manner inconsistent with the law of California when he ruled that as a matter of law the Company was not entitled to *quantum meruit* recovery for the reasonable value of work and materials furnished, and it is submitted that the Judge was guilty of prejudicial error in granting the District's motion to strike paragraph XI [R. 17-22] of the Company's original complaint wherein part of the geologist's report was set out and wherein it was alleged that both parties entered into the contract believing the underlying conditions to be as therein described [R. 51-52]. It is further submitted that the District Judge committed prejudicial error inconsistent with the law of California in refusing to admit the report of the District's geologist in evidence [R. 765] and also in refusing to receive testimony tending to show the conditions believed by the parties to exist when the agreements were executed [R. 763]. The above rulings prevented the Company from developing and introducing evidence to support the theory in accord with the law of California that the actual conditions under which the tunnel construction had to be carried on were so radically different from the conditions believed by both parties to exist when the agreements were executed that the original agreement should be regarded as abrogated and a *quantum meruit* recovery allowed the Company. No formal rescission is necessary as a condition precedent. Cf. *Transbay Const. Co. v. San Francisco, supra.* It is also submitted that, in addition to the above erroneous rulings, the District Judge committed further prejudicial error by failing to apply the law of California as above discussed and by failing to allow the Company *quantum meruit* recovery on its second cause of action.

II.

The Disposition of This Action by the Lower Courts, if Allowed to Stand, Would Amount to a Gross Miscarriage of Justice, Inequitably Removing the Unfortunate But Fortuitous Construction Burden From the People of California Who Derive All of the Benefit From the Completed Work and Are Better Able to Stand the Added Cost, and Thrusting It Upon the Shoulders of the Innocent Contractor Who Derives No Benefit, Is in No Way Responsible for its Presence, and Who Is Less Able to Support Its Weight.

The court is requested to grant the Company's petition for certiorari for the further reason that the adjudication of the lower courts, if allowed to stand amounts to a flagrant and large-scale miscarriage of justice. Under the circumstances set forth in the petition, the Company furnished labor and materials of the reasonable value of $2,502,598.04 in payment for which it received only the sum of $1,346,720.75 [R. 284-86]. These are the figures contained in the statement of the second cause of action in the Company's amended complaint [R. 29] and it would seem that for the time being at least, in view of the stipulated postponement of any proof on damages [R. 425-26], they must be taken as indicative of the great disparity between the reasonable value of the work performed and the amount paid to the Company for such work. The complete benefit of all such labor and materials was derived by the District and ultimately by the people of California. The District took over the work and continued it, utilizing all of the Company's labor and equipment. It should be noted that the District in completing the tunnel encountered obstacles similar to those encountered by the Company; so great were the difficulties that

the District met with that it altered the direction of the tunnel as the Company had sought to do, tacitly admitting that the work could not practicably be completed in accord with the original plans [R. 1079, 1082, 1086]. The finished work would have cost substantially more than was originally anticipated no matter who had done it. And there is no question but that all of the benefits of such work accrued exclusively to the District and the people of California. Not only is it obviously fair to make the District and the people of California rather than the Company pay for these benefits, but it is also true that the Company is far less able to stand the burden of such costs.

Particularly, should the burden be made to follow the benefits when, as in the case at bar, the original agreements were patently one-sided in favor of the benefited party. When the original contracts were signed, neither party had any idea of the misfortunes which were to follow. In the execution of the agreements, however, the Company was at the mercy of the District, being in a position somewhat analogous to an insurance applicant who is proffered a stereotyped form of policy prepared by the insurer. The District had prepared the agreement and according to its terms all doubts were resolved in its favor; in the words of the trial judge it ". . . is a very onerous contract, it is a one-sided contract . . . we find throughout this contract obligations assumed by the contractor without corresponding obligations on the opposite side. We have a contractor surrendering, as to many im-

portant matters, his right to a judicial determination of certain facts, and accepting instead the *ipse dixit* of the Department . . ." [R. 392]. The presence of such a situation presents an additional reason why the Court should not allow this case, as disposed of by the lower courts, to stand without further review; under such circumstances the Company should be afforded every opportunity of escaping from the teeth of an inequitable contract.

III.

A Pronouncement by This Court Upon the Legal Issues Involved in This Case Will Do Much to Promote the Equitable Clarification of an Important Doctrine of Contract Law.

The decisions of the lower courts will only serve to prolong in America the unqualified existence of the antiquated and inequitable rule of contract law that only absolute objective impossibility is sufficient to abrogate an express contract. Modern courts and textwriters have, with some success, been attempting to mollify the harshness of this ancient concept.

> *Cf.* 6 *Williston, Contracts* (Rev. Ed. 1938), §1931; *Restatement, Contracts* (1932), §454.

A pronouncement on the subject by this Court in addition to promoting the ends of justice, will also prevent the petrification in a new and different commercial world of an antique legal thesis designed to answer the needs of the middle ages.

IV.

Even Though the Original Contract Is Not to be Deemed Abrogated in Its Entirety, the Lower Court Failed to Apply California Law in Holding That the Company Could Not Recover in Quantum Meruit After the District Wrongfully Withheld Progress Payments and Seized the Work.

It is also submitted that the lower courts failed to apply applicable California law in disposing of the other argument advanced by the Company, *i. e.*, that on January 15, 1935, the District was already guilty of a breach of the contract by reason of its refusal to pay the December progress payment and that the District could not at that time attempt to invoke the contract provisions relative to delay in order to oust the Company and take over the work. Under California law it is clear that such a refusal to pay installment payments is a sufficient breach of the agreement to put the District in default.

S. F. Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272; 51 Pac. 335 (1897).

The Company did not, by reason of the fact that it stated several causes of action in its complaint in this suit, one of the causes of action being on the contract for damages and another in *quantum meruit* for the value of the work done, thus deprive itself of the right to recover in *quantum meruit.*

Bancroft v. Woodward, 183 Cal. 99 at 102; 190 Pac. 445 (1920).

Conclusion.

For the reasons heretofore set forth, the petitioner respectfully prays that this Court grant its petition for certiorari.

ARTHUR E. MORETON,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term 1940
No. 785.

WENZEL & HENOCH CONSTRUCTION COMPANY,
a corporation,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1940
No. 785.

WENZEL & HENOCH CONSTRUCTION COMPANY, a corporation,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, The Metropolitan Water District of Southern California, answering the petition for writ of certiorari on file herein, respectfully represents as follows:

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit [R. 1328-1349] was written by Circuit Judge Denman, concurred in by Circuit Judges Mathews and Stephens, and is reported in 115 Fed. (2d) 25. The opinion of District Judge Yankwich [R. 391-403] is unreported.

JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229 (43 Stat. 938) (28 U. S. C. A., Sec. 347).

The opinion and judgment of the Circuit Court of Appeals herein were filed October 15, 1940 [R. 1349-1350]. Petition for rehearing was filed November 14, 1940, and was denied November 27, 1940 [R. 1350]. Petition for writ of certiorari was filed in this court on February 24, 1941, and service of notice thereof, together with printed copy of the record and printed copy of petition and brief of petitioner, was made on respondent March 1, 1941.

SUMMARY OF RESPONDENT'S OBJECTIONS TO THE PETITION.

Petitioner bases its application for writ of certiorari herein upon two basic grounds. The first, and apparently the major, ground is that the Circuit Court of Appeals failed to correctly apply the local law with respect to contracts, the performance of which is found to be impossible or so excessively difficult or expensive as to be impracticable and, hence, impossible, as the word is used in contract law.

As to this ground, in the various phases in which it is discussed, respondent's first objection is that there is no foundation in the record for the petitioner's position. The point was not developed in the courts below, in the

pleadings, the evidence, the findings, the appeal of petitioner, or the opinion of the Circuit Court of Appeals. Furthermore, no rescission or other attempt to terminate or reform the contract because of such claimed impossibility or impracticability of performance appears in the record.

References appear in the evidence, and elsewhere, to unanticipated difficulties encountered in prosecuting the work, but always in relation to the alleged erroneous and fraudulent character of the opinion and order of respondent's Chief Engineer determining that petitioner had unnecessarily and unreasonably delayed the performance of the work. Petitioner consistently took the position that, were it not for prevention of performance by respondent, it could have finished the work within the contract time, despite unanticipated difficulties.

The second basic ground relied on in the petition is that the Circuit Court of Appeals failed to correctly apply the local law in the matter of recovery in *quantum meruit* following an alleged breach of contract on the part of respondent in failing to make a certain progress payment.

It is asserted that, upon such breach, petitioner had a right to recover in *quantum meruit*. But the record shows that the breach did not constitute a prevention of performance; that petitioner elected to stand on the contract; that there was no timely, or other, abandonment or rescission; and that the Circuit Court of Appeals correctly applied the local law in holding that under such circumstances the election to rescind could not be made at the time of trial, and recovery had in *quantum meruit*.

STATEMENT OF THE CASE.

For the purpose of the present inquiry, petitioner's statement of substantive facts, except as herein modified and amplified, is sufficiently accurate and complete, although, if the case were before this court on the merits, respondent would feel it necessary to correct certain additional inaccuracies and deficiencies in petitioner's statement.

Respondent desires to call the court's attention particularly to the following statement appearing on page 4 of the petition:

> " * * * The character of the ground and the amount of water encountered was completely different from that which had or could reasonably have been anticipated. The Company's complaint is not merely that the construction was more difficult or more expensive than was expected. *The Company contends that the condition of the ground and the flowage of water actually turned out to be so completely different from such conditions as they were understood to exist or could reasonably have been anticipated to exist by each of the contracting parties, that performance of the public works contract as it was originally understood by the parties was impracticable because of the extreme difficulty and excessive expense involved.* * * *." (Emphasis supplied.)

If this statement is intended to refer to petitioner's contention in the courts below, it is entirely unsupported by the record. Such contention is presented for the first time in support of the pending application for writ of certiorari.

In supplementing petitioner's statement of facts it is respondent's purpose: (1) to indicate the true character of the issues as tried and appealed and to show that the issue of impossibility or impracticability of performance was not raised in the courts below; and (2) to point out that petitioner did not at any time abandon or rescind the express contract and, hence, is without legal basis in the record for recovery on the common counts.

(a) The Pleadings.

The trial court sustained demurrers to, and granted motions to strike portions of, the original complaint, with leave to amend [R. 51-52]. Petitioner, instead of amending, filed its First Amended Complaint, omitting the matter stricken from the first complaint [R. 53-73]. Trial on the issue of liability was had on the First Amended Complaint, as amended during trial [R. 388-389, 407], and the references herein will be to that Amended Complaint, unless otherwise stated.

1. *First Count* [R. 53-71]. The first cause of action is on the Public Works Contract, and prays for damages because of the alleged breach thereof. It was alleged that the opinion and order of the Engineer, finding that unreasonable and unnecessary delay had occurred in petitioner's performance of the work, was grossly erroneous and fraudulent [R. 62], and that the assumption of possession by respondent pursuant to said order was unlawful and constituted a breach of contract amounting to prevention of performance.

Nowhere in the first count is it alleged that the work contracted for was impossible of performance or so difficult or expensive as to be impossible, as the word is used in contract law. No rescission or other termination of the contract for this, or any other reason, is alleged; nor did petitioner pray for any relief because of impossibility of performance.

The gravamen of the first cause of action is that the conduct of the respondent District (not the impossibility of performance) prevented completion of the contract work, and the prayer is for damages for such prevention, measured by what the petitioner claimed it would have earned as profits by complete performance under the contract.

The first cause assumes that, but for the alleged unlawful prevention by respondent, petitioner could have completed the work and would have done so.

2. *Second and Third Counts* [R. 71-73]. The second and third counts contain merely the ordinary allegations of the "common counts" and are based on *quantum meruit* and "money had and received," respectively. The fourth count of the original complaint was dropped in the First Amended Complaint.

It may be urged that the common counts would permit the introduction of evidence of impossibility of performance, the discovery of such impossibility being followed by timely abandonment or rescission, resulting in availability of the remedies in *quantum meruit* and for "money had and received." Petitioner, however, is committed to a different theory of recovery on the common counts.

Prior to the trial the parties entered into a stipulation reading, in part, as follows [R. 383]:

> "In order to enable the Court to pass upon the defenses pleaded in defendant's fourth answer to each count, or cause of action, of plaintiff's first amended complaint without the introduction of all of plaintiff's evidence in chief, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled action, as follows:
>
> "1. It is stipulated that plaintiff's second cause of action in *quantum meruit* arises out of an alleged breach of a valid contract (describing the contract), *to-wit, the failure of said District to pay the December, 1934, estimate to the plaintiff,* * * *
>
> "2. It is further stipulated that plaintiff's third cause of action for money had and received arises out of the *same alleged breach* of said contract, * * *." (Emphasis supplied.)

Petitioner took the position that because respondent had breached the contract by failure to make a progress payment, petitioner could elect at the trial to rescind the special contract and recover on the common counts. No abandonment or rescission of this written contract was pleaded.

Thus, so far as the pleadings are concerned, the issue of impossibility of performance was not presented, nor was a legal basis laid for rescission of the express contract and recovery in *quasi*-contract. The first cause is pleaded on a theory inconsistent therewith, and the common counts are predicated upon the theory set out in the stipulation without postulating any abandonment or rescission of the formal contract.

(b) The Evidence.

1. *Impossibility of Performance.* Turning to the evidence, we find no suggestion of impossibility of performance. True, the difficulties encountered in the work were fully shown, but such difficulties were put forward as an excuse for delay and in an attack upon the validity of the opinion and order of respondent's Engineer finding such delay to have been unreasonable and unnecessary. On this issue the trial court found that the opinion of the respondent's Engineer was not erroneous or fraudulent [R. 415-416]. The Circuit Court of Appeals sustained the finding [R. 1336] (115 Fed. (2d) 28).

Directly contrary to petitioner's present contention that the work was impossible of performance, it is to be noted that petitioner's witnesses (one of them the Vice-President of petitioner company) stated that, despite delays due to the unanticipated difficulties, the petitioner, if permitted to remain in possession, "could have completed the contract within the time limit specified in the contract" [R. 604 (Seefeld), 621 (Peterson), 756-757 (Tinkler)].

2. *Absence of Rescission.* There was no evidence of abandonment, rescission or other termination of the contract, based on impossibility of performance, failure to make the progress payment, or any other ground, petitioner consistently affirming the contract and claiming a right to prosecute the work thereunder.

The evidence showed, without conflict, that the true conditions under which the work was to be done were discovered early in the course of work. Petitioner states, in its petition (page 4):

> "* * * The tunnel excavation was started in the early part of 1934 and *from the very beginning*

> conditions were encountered radically different from those anticipated in the Bidding Sheet, specifications, and in the extensive geological report furnished by the District." (Emphasis supplied.)

Again, on page 5, petitioner states:

> "* * * But *very soon* after excavation was started on the tunnel proper slushy ground and unprecedented flows of water developed." (Emphasis supplied.)

Petitioner, however, did not promptly, or at all, seek in any way to terminate or reform the contract. Until February 12, 1935, petitioner continued its inept attempt to perform, and on that day was removed from the work [R. 412]. At all times petitioner relied on the contract for its claimed right to possession of the site of the work.

On January 15, 1935, the opinion and order of respondent's Engineer, that the work had been and was unnecessarily and unreasonably delayed, was rendered and the order of suspension of work was issued and served upon petitioner [R. 413-414]. Petitioner refused to obey and continued in possession of the tunnel, claiming the right to do so under the contract [R. 418].

Respondent brought suit to enjoin such continued possession and to prevent interference with respondent's entry on the work [R. 418-419]. Petitioner, again relying on the contract, defended the cause, and the District Court, in the exercise of its discretion, denied respondent's application for injunction *pendente lite* [R. 419-420], leaving petitioner in possession. The action was dismissed on

February 11, 1935, on motion of respondent District (plaintiff therein) [R. 423].

Even after having been removed from the work on February 12, 1935, petitioner, relying on the contract, in a suit filed February 18, 1935, and described by the Circuit Court of Appeals as one for "specific performance" [R. 1346] (115 Fed. (2d) 32), sought to regain possession [R. 423]. Petitioner was unsuccessful, the suit being dismissed March 11, 1935, on motion of the respondent District [R. 424].

The trial court found:

> "That plaintiff continued to perform work in the construction of the said San Jacinto Tunnel after the receipt of said letter (Exhibit 'D') on January 9, 1935, until February 12, 1935, when defendant took possession of said Jacinto Tunnel and appurtenant works as herein found. That plaintiff did not at any time, or at all, rescind or terminate said contract for the construction of the said San Jacinto Tunnel and the appurtenant works of the Colorado River aqueduct, a copy of which contract is marked Exhibit 'A' and attached to the first amended complaint herein." [R. 412.]

The Circuit Court of Appeals said:

> "The Company (petitioner here) offered no proof at the trial that it had in fact rescinded the contract and, in the face of the record, the trial court's finding that no rescission occurred cannot be set aside." [R. 1346] (115 Fed. (2d) 32.)

(c) The Opinion of the Circuit Court of Appeals.

The theories upon which the case was tried and appealed are fully disclosed by the opinion of the Circuit Court of Appeals. All issues presented by petitioner are discussed and disposed of. The matter of impossibility of performance is not mentioned, because it was not presented [R. 1328-1349] (115 Fed. (2d) 25-33). The right of petitioner to recover on the common counts, in the absence of abandonment or rescission, is discussed (on the only ground presented to the court as the basis of such right) and is correctly decided.

It has been our purpose, in this partial review of the facts, to show that the issue of impossibility of performance was not present in the courts below, and that there was no abandonment, rescission, or other attempt to terminate the contract by reason of any such impossibility or because of respondent's failure to make the progress payment, or for any other reason, the petitioner at all times standing on the contract and seeking recovery for damages alleged to have resulted from the respondent's unlawful prevention of full performance thereof.

ARGUMENT.

I.

Petitioner's Statement of "Questions Involved" Does Not Warrant Issuance of the Writ.

The "Questions Involved" as stated on pages 9-10 of the petition, cannot now be raised by petitioner on the record at bar.

Question No. (1) (p. 9), is predicated upon the claimed "impossibility of performance," and asks whether the trial court, in the face of such "impossibility," was justified in holding that, as a matter of law, the company could not recover in *quantum meruit.*

No such question was presented to the trial court by the pleadings or the evidence. The theory of petitioner's *quantum meruit* count, as set out in the stipulation [R. 383] and as developed in the evidence and in argument, is predicated on quite a different basis, *i. e.,* that since respondent had breached its contract by refusing to make a progress payment, petitioner was entitled to treat the contract as at an end and to sue in *quantum meruit.* The Circuit Court of Appeals said [R. 1345] (115 Fed. (2d) 31):

> "There remains for consideration the Company's claim that the district court improperly denied it judgment on the second and third counts for recovery aside from the contract. In addition to the acts of the District in giving the notice of suspension and ejecting the Company from the works, the Company relies upon the act of the District of January 9, 1935, in withholding the December progress payment as supporting its suit in quantum meruit."

In making this observation, the Circuit Court of Appeals stated the only ground presented to it and to the District Court as the basis of recovery in *quantum meruit*. No question such as is now suggested was presented to either of the lower courts.

Question No. (2) (pp. 9-10), is closely related to question No. (1). It erroneously assumes that there was present in the case the issue of impossibility of performance, and asks whether, in view of the issue so assumed, it was not prejudicial error for the trial court (1) to strike that portion of the company's original complaint alleging that the parties entered into the contract relying upon information contained in a certain geological report, (2) to refuse to permit the amendment of the First Amended Complaint to restore such allegations, and (3) to refuse to admit the geological report in evidence.

The assumed issue was not in the case. There was no allegation or evidence of impossibility of performance (however defined). Petitioner had not sought in any way to terminate or reform the contract, but, on the contrary, with full knowledge of the actual underground conditions, had repeatedly affirmed it and relied thereon. The preliminary inducements to the contract were not involved.

Question No. (3) (p. 10), refers to "the relation between the unanticipated ground conditions and the time initially estimated for completion of the work," and asks whether, in the absence of entire abrogation of the contract, "was not the District's seizure of the work because of alleged delay combined with its previous refusal to pay the December progress payment a breach of contract."

The question has two phases. The first phase (as to the legality of the seizure of the work in view of unanticipated ground conditions), in reality, goes to the factual issue of the alleged erroneous and fraudulent character of the opinion and order of respondent's Engineer, finding unreasonable and unnecessary delay and suspending the work, upon which opinion and order respondent based its seizure of the tunnel. On this issue the evidence was full and complete and disclosed all of the conditions under which the work had been, in part, performed, including "unanticipated ground conditions." The finding in favor of respondent, *i. e.*, the finding that the opinion of respondent's Engineer was not erroneous or fraudulent [R. 415-416], was sustained by the Circuit Court of Appeals on the record [R. 1336] (115 Fed. (2d) 28). The facts being so determined, the seizure of the tunnel did not constitute a breach of contract.

The second phase of the question relates to respondent's refusal to pay a progress estimate and is entirely unrelated to the unanticipated ground conditions. The refusal to pay was predicated on the terms of the supplemental agreement [R. 409-411]. The Circuit Court of Appeals did not find it necessary to determine whether such refusal was a breach of the Public Works Contract [R. 1342] (115 Fed. (2d) 31). The refusal did not involve a prevention of performance and petitioner did not rescind, or otherwise terminate the contract, by reason thereof, but, at the time of respondent's seizure of the work, was still in possession and continuing its attempt to perform under the contract [R. 412, 418].

II.

Petitioner's "Reasons for Granting Writ of Certiorari" Are Untenable.

The first reason advanced (Petition, p. 10) for granting the writ is "Because the District Court and the Circuit Court of Appeals in disposing of this case have failed to apply, or reach a result consistent with, the local law of the State of California".

By reference to the brief (Part I, pp. 15-19), it becomes apparent that the "failure to apply local law" relates, in the main, to the erroneously assumed issue of impossibility of performance. There being no such issue in the case, the reason falls. (*Helvering v. Minnesota Tea Co.* (1935), 296 U. S. 378, 380, 80 L. Ed. 284, 286; *United States v. Atkinson* (1935), 297 U. S. 157, 158-159, 80 L. Ed. 555, 556; *Edward Hines Yellow Pine Trustees v. Martin* (1924), 268 U. S. 458, 464-465, 69 L. Ed. 1050, 1053-1054.)

Thus the cases cited by petitioner at page 15 of its brief, (*Mineral Park Land Co. v. Howard* (1915), 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F 1; *Transbay Construction Co. v. City and County of San Francisco* (1940), 35 Fed. Supp. 433; *Christin v. Superior Court* (1937), 9 Cal. (2d) 526, 533, 71 Pac. (2d) 205, 208) in support of the contention that California recognizes impracticability of performance due to excessive and unreasonable difficulty and expense as legal impossibility, have no application to any issue in the case at bar. We do not disagree with such principle of contract law and neither did the District Court nor the Circuit Court of Appeals: The question was not presented or passed upon and there is no occasion to consider such proposition now raised by petitioner for the first time.

Petitioner, in support of its argument that "the actual conditions under which the tunnel construction had to be carried on were so radically different from the conditions believed by both parties to exist when the agreements were executed that the original agreement should be regarded as abrogated and a *quantum meruit* recovery allowed the company" and that "No formal rescission is necessary as a condition precedent" (brief, p. 19), cites *Transbay Construction Co. v. City and County of San Francisco, supra.* This decision was made by the United States District Court for the Northern District of California in issuing a nonappealable order of reference to a master, and we are informed that the trial before the master is now under way. The case cannot be said to have any finality. Petitioner quotes (brief, p. 18) a portion of the District Judge's opinion in which he concludes that a contractor, after completing a Public Works Contract let on competitive bidding, may sue in *quantum meruit* for work done as a result of unanticipated difficulty and expense. The District Judge, immediately following the excerpt quoted by petitioner, cites several cases but none of these cases is from California and the decision is contrary to the law of that state. (Compare *Thos. Kelly & Sons, Inc. v. City of Los Angeles* (1935), 6 Cal. App. (2d) 539, 45 Pac. (2d) 223.)

Part IV of the brief (p. 23), presents another claimed failure to apply local law. Even though we take as correct the statement therein made that "Under California law it is clear that such a refusal to pay installment pay-

ments is a sufficient breach of the agreement to put the District in default" (Petitioner's Brief, p. 23), it is also clear that timely rescission, or some act of abandonment susceptible of treatment as a rescission, must precede action in *quantum meruit,* based on work originally covered by special contract. Petitioner, having elected to stand on the contract until after seizure of the tunnel by respondent on February 12, 1935, pursuant to the Engineer's opinion and order of January 15, 1935, could not thereafter abandon and rescind the contract on the ground of respondent's failure on January 9, 1935, to make a progress payment, and then recover in *quantum meruit.* (*American-Hawaiian Engineering & Construction Co. v. Butler* (1913), 165 Cal. 497, 513, 133 Pac. 280, 286.)

There being no allegation or proof of rescission or abandonment or other termination of the contract, and the trial court having found that petitioner "did not at any time, or at all, rescind or terminate said contract" [R. 412], there was no failure to apply local law. The care with which the Circuit Court of Appeals considered and applied "the local law" as established by the California cases, including those cited by petitioner at page 23 of its brief (*S. F. Bridge Co. v. Dumbarton L. & I. Co.* (1897), 119 Cal. 272, 51 Pac. 335; *Bancroft v. Woodward* (1920), 183 Cal. 99, 190 Pac. 445), is exemplified in the following portion of that Court's opinion [R. 1345-46] (115 Fed. (2d) 32):

> "Although under the California rule in building contracts the failure to pay an installment when due is not such a breach as will support an action on the contract for full performance, it will support a rescis-

sion of the contract and recovery in *quantum meruit*. Cox v. McLaughlin, 54 Cal. 605, 608, 609, 619; Cox v. McLaughlin, 76 Cal. 60, 62, 63, 18 P. 100; Porter v. The Arrowhead Reservoir Co., 100 Cal. 500, 502, 503, 35 P. 146; San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 274, 51 P. 335; see Fairchild-Gilmore-Winton Co. v. Southern Ref. Co., 158 Cal. 264, 274, 110 P. 951, and Connel v. Higgins, 170 Cal. 541, 150 P. 769, 772; Monson v. Fischer, 118 Cal. App. 503, 519, 5 P. (2d) 628. Rescission of the contract in such case, however, must be within a reasonable time of the breach. Cal. Civil Code, Sec. 1691; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 736, 159 P. 163; Bancroft v. Woodward, 183 Cal. 99, 107, 108, 190 P. 445, Davis v. Rite-Lite Sales Co., 8 Cal. (2d) 675, 682, 67 P. (2d) 1039.

"Assuming that it was still reasonable for the Company to elect to rescind the contract because of the alleged breach of January 9, 1935, after the District had served its notice of suspension of work under the contract and had ousted the Company from the work, the fact remains that such an election was never made.

"On February 18, 1935, the Company brought a suit in equity for specific performance of the contract to require possession to be restored to the Company, in an attempt to regain possession of the tunnel so that it might continue the work. Following the dismissal of this suit upon motion of the District on March 11, 1935, the Company took no further action with respect to the contract until January 8, 1937, when the case at bar was filed. The first amended complaint, on which trial occurred, was filed May 24, 1937. By neither of these pleadings did the

> Company allege that it had abandoned the contract or had rescinded it. The Company offered no proof at the trial that it had in fact rescinded the contract and, in the face of the record, the trial court's finding that no rescission occurred cannot be set aside. Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 873; Cf. Palmer v. Fix, 104 Cal. App. 562, 567, 286 P. 498, (Hearing den. by Sup. Ct.)."

Reason No. (2) (Petition, p. 10; Brief, Part II, pp. 20-22) complains of a miscarriage of justice and the inequitable distribution of burdens of the cost of public work. The case is one at law. There was no issue presented in any way related to the "reason" thus urged. The cause was fairly tried and correctly decided. Review by this Court is not warranted by the "reason" assigned.

Reason No. (3) (Petition, pp. 10-11) directs attention to an asserted need for clarification of the law. Referring to petitioner's brief (Part III, p. 22), for amplification of this reason, we find that it relates to the law governing the rights of parties in instances in which contracts are impossible of performance and discusses "objective impossibility" as contrasted with such excessive difficulty and expense as to constitute impossibility in the eyes of the law. Inasmuch as the matter so discussed was not presented to the courts below and is not mentioned in the pleadings, evidence, findings, petitioner's appeal to, or the opinion of, the Circuit Court of Appeals, the need for clarification is not apparent.

Conclusion.

Neither the "Questions Involved" nor the "Reasons for Granting Writ of Certiorari" as set out in the petition on file herein, nor any issues available to petitioner on the record at bar, justify issuance of the writ prayed for.

Respondent respectfully urges that the petition be denied.

Respectfully submitted,

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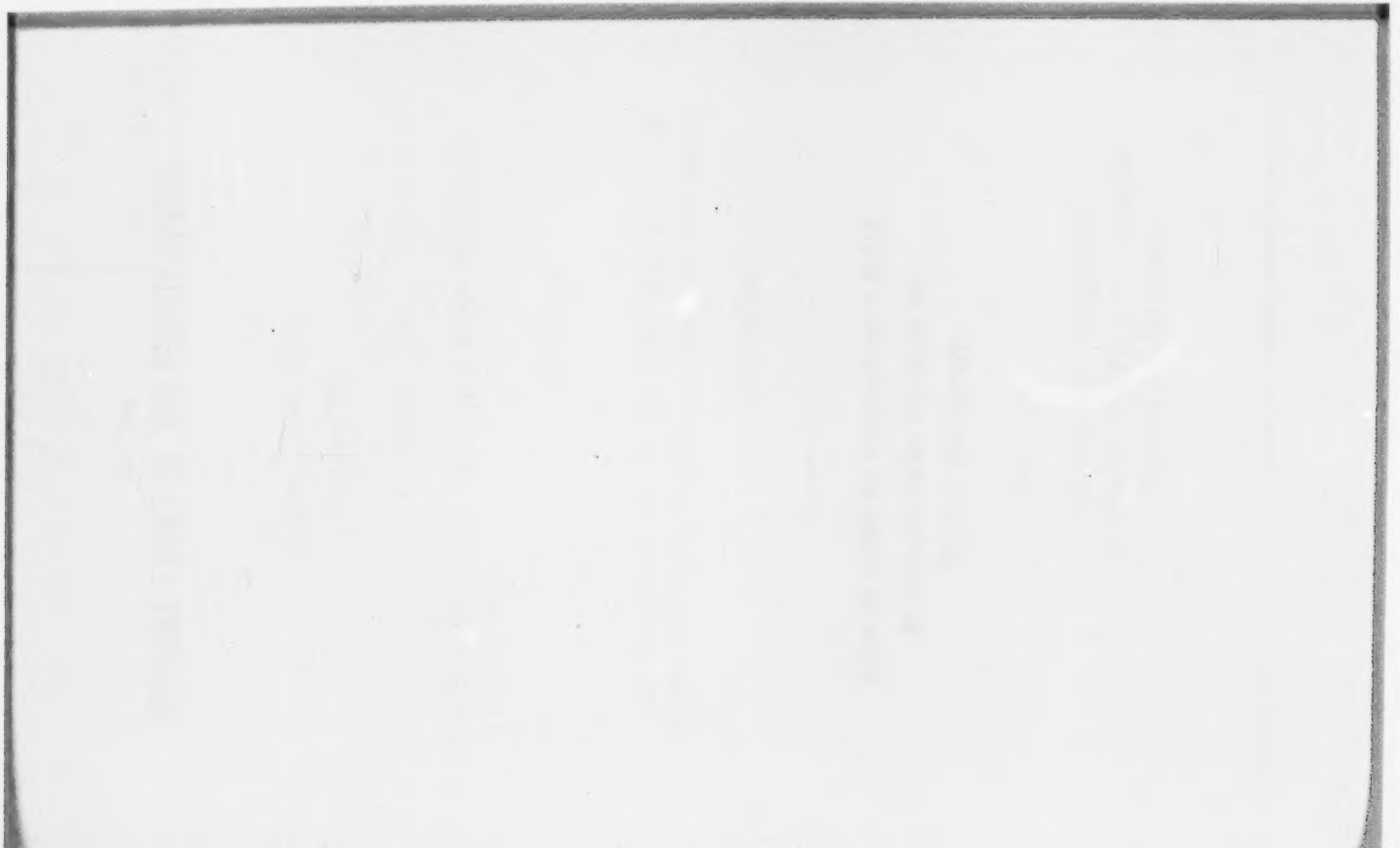

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

Number 785

WENZEL & HENOCH CONSTRUCTION COMPANY, a corporation,

Petitioner,

vs

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a municipal corporation,

Respondent.

Brief in Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Respondent.

Brief in Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your Petitioner, Wenzel & Henoch Construction Company, in reply to the Respondent's brief in opposition to the petition for certiorari, respectfully shows to the Court as follows:

The Respondent virtually admits that the State Courts in California recognize impracticability of contract performance due to excessive difficulty and expense as the equivalent of legal impossibility (Resp. Br. 15). The Respondent does not deny that in disposing of the case at bar the lower Courts failed to apply and arrived at a result inconsistent with the local law of California. In opposing the Petitioner's prayer, however, the Respondent relies upon two contentions: (1) That the Petitioner's argument based on impracticability of performance cannot be urged in this Court because it was not developed in the lower Courts, and (2) That the Petitioner narrowed the scope of its prayer for *quantum meruit* recovery in a stipulation set forth on page 7 of the Respondent's brief.

In regard to the Respondent's contention that the impracticability argument cannot be considered by this Court because it was not properly developed in the lower Courts, the Petitioner respectfully wishes to direct the attention of this Court to the fact that the principal reason why the Petitioner did not more fully develop the impracticability argument in the Courts below was that the Petitioner was repeatedly prevented from doing so by the Trial Court's rulings in connection with the pleadings and the evidence. The Trial Court granted the Respondent's motions to strike the portion of the Petitioner's complaint referring to and partially setting forth the printed report of the District's Geologist and alleging that the Company relied thereon in making its bid (R. 51-52). During the trial the Court refused to allow this report to be put in as evidence (Pl. Ex. 16; R. 765), and it also excluded all testimony tending to prove that both parties relied upon this report and other information supplied by the District in making the contract (R. 1284-90). Later the Trial Court again refused to allow certain amendments to the Petitioner's complaint incorporating such matters (R. 1296-1300). Petitioner was continually prevented from making allegations

and putting in evidence which would enable it properly to develop the argument based on impracticability of performance. The very rulings which the Petitioner assigns as prejudicial errors wherein the Trial Court failed to apply and reach a result consistent with the local law of California, are the rulings which forced the petitioner to rely primarily upon other theories of recovery and prevented the proper development of the impracticability argument in the Courts below.

In regard to the Respondent's argument that this Court is precluded from considering the impracticability argument because of the stipulation set out on page 7 of Respondent's brief, the Petitioner respectfully wishes to direct the attention of the Court to the fact that the stipulation was made for a very limited purpose,—"In order to enable the Court to pass upon the defenses pleaded in the defendant's fourth answer to each count, or cause of action, of plaintiff's first amended complaint without the introduction of all plaintiff's evidence in chief, * * *" (R. 383). The defendant's fourth answer to the various counts is restricted in scope (R. 310-14), and the stipulation was made for the sole purpose of facilitating the Trial Court's ruling upon these defenses. It is quite apparent that by this stipulation neither of the parties intended irrevocably to narrow the issues of the case, waiving all previous objections and every other legal theory of recovery. This Court has repeatedly expressed its unwillingness to be bound by stipulations relating to matters of law.

Swift & Co. vs. Hocking Valley Ry. Co., 243 U. S. 281 (1917);

Sanford's Estate vs. Comm., 308 U. S. 39, 51 (1939);

Case vs. Los Angeles Lumber Products Co., 308 U. S. 106, 114 (1939);

cf. *Andrews vs. St. Louis Joint Stock Land Bank*, 107 F. (2d) 462, 470 (C. C. A. 8th, 1939).

And this Court has also shown its willingness to relieve parties from the injustice of stipulations which, given inadvertently, may develop into pitfalls.

Carnegie Steel Co. vs. Cambria Iron Co., 185 U. S. 403, 444 (1902).

See also:

Aronstam vs. All-Russian Central Union, 270 Fed. 460, 464 (C. C. A. (2d) 1920);

Federal Export Corp. vs. U. S., 25 F. Supp. 109 (Ct. Cl. 1939).

Respectfully submitted,

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